

MOTOR MONDAY



Monday, July 26, 2021

OFTEN OVERLOOKED JURY INSTRUCTIONS AND OTHER REMINDERS FOR DUI CASES

Presented by:

Beth Barnes
Traffic Safety Resource Prosecutor (TSRP)
GOHS/City of Phoenix

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
3838 N. Central Ave., Suite 850
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

APAAC MOTOR MONDAY

**Useful, But Often Overlooked,
Jury Instructions for DUI Cases
& Other Reminders**

July 26, 2021

NOTE: These are meant to merely provide ideas. They can and should be improved and adjusted to fit your case/facts.

General Jury Instruction Case Law

General case law supporting giving instructions

The State is entitled to a jury instruction supported by the facts of the case. *State v. Reid*, 155 Ariz. 388 (1987)

A party is entitled to an instruction on any theory of the case reasonably supported by the evidence.

State v. Axley, 132 Ariz. 383, 392 (1982).

Jury instructions are designed to help the jury understand the applicable law. The language used should allow for clear comprehension by the average lay person.

State v. Noriega, 187 Ariz. 282, 284 (App. 1996).

The Court Should give the Presumption of Impairment Instructions.

State v. Cooperman, 232 Ariz. 347 (2013) suggests the court must instruct on the presumptions of impairment if there is a reading in cases involving alcohol only [not the combination of drugs and alcohol].

Suggestion: Do not Automatically concede the language in the RAJIs. It can be wrong and certainly can be improved

Curative Instructions

- ⊙ Court must analyze whether the defendant can still receive a fair trial. Mistrial should only be granted if justice will be thwarted without a new trial. *State v. Herrera*, 203 Ariz. 131, 134 (App. 2001).
- ⊙ It is presumed jurors will follow the curative instruction. *State v. Dann*, 205 Ariz. 557, 570 (2003).

Definitions

Definition of “Highway”

May be useful for the 28-1383(A)(5) - Wrong-way DUI charge. Especially if the offense was committed on a road the jury may not realize qualifies as a ‘Highway’ [Definition is not included in the RAJI]

ARS § 28-101(57) "Street" or "**highway**"

the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel.

For purposes of the crime of Aggravated DUI while driving the wrong-way on the highway, the term highway means any public road.

Safer instruction for appeal - For purposes of the crime of Aggravated DUI while driving the wrong-way on the highway. Highway is defined as: the entire width between the boundary lines of every way if a part of the way is open to the use of the public for purposes of vehicular travel. [Then explain what this means during closing argument.]

Definition of Vehicle - Useful if you have an unusual vehicle

28-101(71). "Vehicle":

(a) Means a device in, on or by which a person or property is or may be transported [or drawn] on a public highway.

For purposes of these charges, “vehicle” means a device in, on or by which a person or property is or may be transported [or drawn] on a public highway

May want to include the vehicle in question i.e. “A golf cart is a vehicle.”
Source: *In re Adam P.*, 201 Ariz. 289 (App. 2001); *State v. Streck*, 221 Ariz. 306 (App. 2009.)

Definition of Drive

Drive means to operate or be in actual physical control of a motor vehicle.

Source: 28-101(21).

Breath Test Instructions

Records of Periodic Maintenance [28-1323(A)(5) Instruction]

The State has introduced evidence of periodic maintenance through records which show the Intoxilyzer 8000 [Intoxilyzer 9000] breath testing device was in proper operating condition at a time before, after and at the time of the tests. Such records are prima facie evidence that the device was in the proper condition at the time of the tests. [OR Such records are sufficient to establish the device was in the proper condition at the time of the tests.]

Source: *State v. Peraza*, 239 Ariz. 140 (App. 2016); *State v. O'Haire*, 149 Ariz. 518 (App. 1986); 28-1323(A)(5).

Prima facie means evidence that is sufficient to establish a given fact.

Source: Black's Law Dictionary, 5th edition

2100 to 1 Ratio Evidence Does Not Apply to 28-1381(A)(2) or 28-1382

Evidence has been presented regarding the 2100 to 1 ratio (partition ratio, blood to breath ratio). This evidence does not apply to the 28-1381(A)(2) [28-1382] charge(s). You are not to consider this evidence when deciding whether the defendant's alcohol concentration was .08 or greater [.15, .20] within two hours of driving.

Reminder: Review the jury instruction in breath testing cases for the term "blood alcohol" concentration. This should be changed to "breath alcohol concentration" or just "alcohol" concentration.

A Breath/Blood Test is Not Necessary for the 28-1381(A)(1) Charge

The defendant has been charged with violating A.R.S. 28-1381(A)(1). This charge does not require a breath or blood test result. Nor does it require proof of any specific alcohol concentration.

REFUSAL JURY INSTRUCTIONS [FSTs and Breath/Blood Tests]

Refusal of Field Sobriety Tests.

An officer has the right to request a person who is suspected of driving under the influence of an intoxicant to submit to field sobriety tests. If you find that the defendant refused to submit to such tests, the defendant's refusal may be considered as evidence against him/her.

SOURCE:

State ex. rel. Verburg v. Jones (Phipps, Real Party in Interest), 211 Ariz. 413 (App. 2005); *State v. Superior Court (Spears, Real Party in Interest)*, 154 Ariz. 275 (App. 1987); *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989); *State v. Reid*, 155 Ariz. 388 (1987).

Refusal of Field Sobriety Tests.

An officer has the right to request a person who is suspected of driving under the influence of an intoxicant to submit to field sobriety tests. If you find that the defendant refused to submit to such tests, the defendant's refusal may be considered as evidence against him/her. You may consider the inferences associated with the refusal as you deem appropriate.

SOURCE:

State ex. rel. Verburg v. Jones (Phipps, Real Party in Interest), 211 Ariz. 413 (App. 2005); *State v. Superior Court (Spears, Real Party in Interest)*, 154 Ariz. 275 (App. 1987); *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989); *State v. Reid*, 155 Ariz. 388 (1987).

Refusal of Field Sobriety Tests.

An officer has the right to request a person who is suspected of driving under the influence of an intoxicant to submit to field sobriety tests. If you find that the defendant refused to submit to such tests, the defendant's refusal may be considered as evidence against him/her. You may consider the fact of refusal as evidence that the defendant was under the influence of an intoxicant. You are to give the evidence such weight as you determine to be appropriate, together with all of the evidence in this case.

SOURCE:

State ex. rel. Verburg v. Jones (Phipps, Real Party in Interest), 211 Ariz. 413 (App. 2005); *State v. Superior Court (Spears, Real Party in Interest)*, 154 Ariz. 275 (App. 1987); *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989); *State v. Reid*, 155 Ariz. 388 (1987).

Refusal of Breath/Blood Test Instruction

A person who is arrested for driving under the influence of intoxicating liquor is required by law to submit to a breath/blood test to determine the level of alcohol in his body. If you find that the defendant refused to submit to such a test you may consider the fact of refusal as evidence that the defendant was under the influence of an intoxicant. You are to give the evidence such weight as you determine to be appropriate, together with all of the evidence in this case.

Source:

A.R.S. § 28-1388 (D); *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989)

Refusal to Submit to Test

Any person who operates a motor vehicle within the state gives consent to a test or tests of [his] [her] blood, breath, or urine for the purposes of determining the alcoholic content of [his][her] blood if arrested for driving under the influence.

A refusal to submit to the chemical test under the implied Consent Law occurs when the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and exhibited an unwillingness to submit to the test.

If you find that the defendant refused to submit to such a test you may consider the fact of refusal as evidence that the defendant was under the influence of an intoxicant. You are to give the evidence such weight as you determine to be appropriate, together with all of the evidence in this case.

A.R.S. § 28-1388 (D); 28-1321; *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (App. 1989)

Some DUI Drug Instructions

28-1381(A)(3)

May want to add the fact that the drug is defined in the drug schedule

- ☉ For example: Alprazolam is a drug defined in A.R.S. § 13-3401

A.R.S. § 28-1381(A)(1) Prescription is Not a Defense

It is not a defense to a charge of A.R.S. § 28-1381(A)(1) that a person is or has been entitled to use a drug under the laws of this state. You may not consider whether the defendant had a valid prescription or was taking drugs as prescribed in determining whether the defendant was impaired to the slightest degree by the drugs in his/her system.

Source: **A.R.S. § 28-1381(B)**

TIPS:

- If defendant is able to appropriately raise the 28-1381(B) Affirmative Defense, an instruction should be given. Be sure the fact that it is the defendant's burden to prove the use was "as prescribed" is included. May want to define preponderance of the evidence.
- May want to consider additional instructions
 - ☉ Prescription must be valid on the DOV
 - ☉ Prescription – must be prescribed by a US doctor (defendant's burden)
 - ☉ *Fannin – Defendant's Burden to Prove Affirmative Defense*
 - ☉ Alcohol, Drugs, Intoxicating Liquor, Or Combination

Miscellaneous Instructions

Private Property [Source: 28-1381, 28-1382, 28-1383]

The crimes of A.R.S. § 28-1381(A)(1) Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor, A.R.S. § 28-1381(A)(2) - Having an Alcohol Concentration of .08 or More Within Two Hours of Driving, and A.R.S. § 28-1382(A) Having and Alcohol Concentration of .15 or More Within Two Hours of Driving each apply to offenses which occur on private property.

The offenses of A.R.S. § 28-1381(A)(2) - Having an Alcohol Concentration of .08 or More Within Two Hours of Driving and A.R.S. § 28-1381(A)(1) Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor can be committed while on private property.

The crimes of A.R.S. § 28-1381(A)(2) - Having an Alcohol Concentration of .08 or More Within Two Hours of Driving and A.R.S. § 28-1381(A)(1) Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor apply throughout the state regardless of whether they occur on private property.

Flight or Concealment (May be useful when they try to elude the officer or hide their alcohol/drugs.)

RAJI – [This can be improved]

In determining whether the State has proved the defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. [You may also consider the defendant's reasons for running away, hiding, or concealing evidence.] Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

Necessity of Not a Defense to DUI

Necessity is not a defense to DUI. This means a person may not use a vehicle to (add your facts here) (flee a physical confrontation) if that person is impaired to the slightest degree and/or has an alcohol concentration of .08 or greater.

Source: *State v. Fell*, 203 Ariz. 186, 187 (App. 2002).

DUI Mental State [RAJI]

The Crime of driving while under the influence of intoxicating liquor or drugs does not require proof of a culpable mental state. The Defendant is not required to know that he was under the influence of intoxicating liquor or drugs.

Source: RAJI (CRIMINAL); *State ex rel. Romley v. Superior Court*, 184 Ariz. 409, 411 (App. 1995); *State v. Parker*, 236 Ariz. 474 (1983).

Voluntary Intoxication

Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, [an illegal substance under chapter 34 of this title] or other psychoactive substances or the abuse of prescribed medications is not a defense for any criminal act, including DUI.

Source: ARS § 13-503

Police Reports

Police reports are not admissible evidence. You must decide this case based on the evidence which was presented to you in court, following the Judge's instructions as to the law.

Preliminary Instructions:

- ⦿ Do not overlook
- ⦿ Remember people remember recent info
- ⦿ Preliminary instructions are not incorporated in to final instructions so make certain the final instructions cover the needed points

Review Jury Instructions Before the End of the Trial

- ⦿ Some may no longer apply - Ask to have them removed
 - > Stipulations
 - > Defendant need not testify
- ⦿ May need to tweak or make additions